**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| GTE Telephone Operating Cos. | ) | CC Docket No. 98-79 |
| GTOC Tariff No. 1 | ) | |
| GTOC Transmittal No. 1148 | ) | |
| | ) | |

# REPLY COMMENTS OF KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC") respectfully submits the following reply comments in this proceeding concerning petitions for reconsideration filed by MCI WorldCom, Inc. ("MCI WorldCom") and the National Association of Regulatory Utility Commissioners ("NARUC") of the *DSL Jurisdictional Order*.[1] KMC submitted initial comments on January 5, 1999.[2]

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[1] *GTE Telephone Operating Cos.*, Memorandum Opinion and Order, CC Docket No. 98-79, FCC 98-292, released October 30, 1998 (*"DSL Jurisdictional Order"*). *See* Public Notice, DA 98-2502, released December 4, 1998.

[2] Comments of KMC Telecom, Inc., CC Docket No. 98-79, filed January 5,1999.

## I. COMMENTS PROVIDE NO BASIS FOR APPLICATION OF THE "TEN PERCENT RULE"

In its initial comments, KMC pointed out that there was no factual information in the record that could support the Commission's conclusion that more than ten percent of traffic over GTE's DSL service is, or will be, jurisdictionally interstate under the Commission's end-to-end jurisdictional analysis.[3] For example, there were no factual studies of Internet traffic, or even estimates with at least some factual support, providing a basis for concluding that ten percent or more of usage of GTE's DSL service would involve communication with an out-of-state point. Nor did the *DSL Jurisdictional Order* discuss or acknowledge that ISPs cache distant sites on their local servers, and that information service providers frequently establish "mirror" sites, in order to economize on telecommunications charges and to provide faster and higher quality service to subscribers. KMC also pointed out that the Commission had not identified on what basis it would measure Internet traffic, even on a theoretical basis.[4] Instead, KMC pointed out that the Commission relied on no more than shop-worn statements about the worldwide capabilities of the Internet to support its conclusion that more than ten percent of Internet traffic is jurisdictionally interstate under its end-to-end jurisdictional analysis.[5] KMC believes that the Commission has merely assumed that ten percent of usage of GTE's DSL service will be jurisdictionally interstate, without really knowing whether this is the case or not. Therefore,

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3 KMC Comments at 8.

4 *Id.* at 10.

5 *Id.* at 11.

KMC pointed out that the Commission's application of the ten percent rule was arbitrary and capricious and unlawful.

The initial comments submitted in response to the MCI WorldCom and NARUC petitions for reconsideration do not provide any support of the kind that could provide a rational basis for application of the ten percent rule in this case. Thus, no facts or basis for measurement of Internet traffic is presented by commenters opposing reconsideration.[6] Instead, as before, commenters in support of application of the ten percent rule merely provide starry-eyed, sweeping generalizations, and assumptions about the capabilities of the Internet, some of which quote Commission statements about the Internet in proceedings that have nothing to do with application of the ten percent rule. Thus, we are told, for example, that the Internet is a "global medium of communications – or 'cyberspace' -- that links people, institutions, corporations and governments around the world;"[7] and, with virtually no factual support, that "there is no question" that most Internet traffic is interstate.[8] Apparently, it has not occurred to these parties that the voice network is also a "global medium of communications" "that links people, institutions, corporations and governments around the world" but that this does not justify an unsupported assumption concerning what percent of voice traffic is jurisdictionally interstate.

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[6] The reference by Pacific Bell to a statement by the Park Region Telephone Company in an unrelated proceeding that less than 2% of inquiries to its Minnesota Web site originate in Minnesota is irrelevant. Pacific Bell Opposition at 4. The fact that this telephone company's web site is accessed most frequently from out-of-state, does not show that most usage of GTE's DSL service will be jurisdictionally interstate.

[7] Ameritech Opposition at 12, *citing Internet Over Cable: Defining the Future in Terms of the Past*, FCC Office of Plans and Policy Working Paper No. 30, Aug. 1998, at 6.

[8] US West Opposition at 9.

KMC also submits that lack of supporting information does not justify a leap to the conclusion that more than ten percent of DSL traffic will be jurisdictionally interstate, as some parties apparently assume.[9] KMC reiterates, therefore, that there is an insufficient basis in the record to warrant application of the ten percent rule.

However, the record does support KMC's concern that application of the ten percent rule in this case is a momentous conclusion with far-reaching regulatory consequences. Thus, it is pointed out that application by the Commission of the ten percent rule in this case precludes state tariffing of xDSL services used to connect to the Internet and constitutes an assertion of exclusive federal jurisdiction over use of xDSL or similar advanced services used to connect to the Internet.[10] xDSL and similar services may well represent the nation's future in terms of how consumers and businesses connect to the Internet. At the same time, the Internet and Internet Protocol ("IP") networks are growing rapidly and may well supplant voice, circuit switched networks. Thus, the Commission in this proceeding seeks to assert exclusive federal jurisdiction over the networks of the future. To the extent the Commission intends to reach this far reaching assertion of jurisdiction it should do so only in a suitable rulemaking proceeding directly dealing with that result, not in the limited context of a carrier-initiated tariff proceeding. The fact that the Commission has done so with so limited support makes this all the more troubling - and unlawful.

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9 *Id.*

10 Ameritech Opposition at 12, 13.

## II. "TELECOMMUNICATIONS" ENDS WHERE "INFORMATION SERVICE" BEGINS

In its initial comments, KMC pointed out that the Commission has determined that "telecommunications" and "information service" are mutually exclusive regulatory categories, and that, under the Commission's long-standing framework governing information services, an information service will be considered for regulatory purposes to be exclusively an information service even though it may use telecommunications.[11] Thus, under the Commission's own "contamination doctrine," once a service has any information service components it becomes exclusively an information service.[12] Therefore, the Commission has considered what regulatory consequences should attach to the fact that information services can use telecommunications, or, in the words of the 1996 Act are provided "via telecommunications," and has determined that for regulatory purposes information services and telecommunications are mutually exclusive regulatory categories notwithstanding that information services are provided via telecommunications. Therefore, for regulatory purposes under the 1996 Act, telecommunications ends where the information service begins.

Initial comments do not dispute that telecommunications and information services are mutually exclusive regulatory categories under the Act. Some commenters explicitly recognize

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[11] KMC Comments at 13. Federal State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501 (1998)("*Report to Congress*"), para. 39.

[12] As stated by the Commission: "[u]nder the 'contamination theory' developed in the course of the *Computer II* regulatory regime, [value added networks] that offer enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers. The enhanced component of their offerings 'contaminates' the basic component, and the entire offering is therefore considered to be enhanced." *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1153, n. 23.

that a telecommunications service becomes an information service as soon as the information service provider offers something more than telecommunications, such as data processing enhancements.[13] Thus, KMC submits that the record supports that telecommunications and information services are mutually exclusive regulatory categories under the Act and that, therefore, telecommunications ends where information service begins.

KMC disputes the apparent assumption by some parties that there is any meaningful basis for concluding that telecommunications continues past an information service as a factual versus regulatory matter.[14] "Telecommunications" and "information service" are constructs of the Act and whether either is said to exist in any situation is a mixed question of fact and law. In this connection, the law is, as determined by the Commission, that where any enhanced component is added to a telecommunications service the entire service is an information service. There can be no factual existence of telecommunications under the definition of that term in a situation where an enhanced component is added to telecommunications because the service then no longer meets the definition of telecommunications. Instead, it has become an information service.

KMC reiterates that the fact that a common carrier offers telecommunications to an information service does not mean that telecommunications continues past the information service. The offering of the common carrier to the information service provider is purely telecommunications since the common carrier has not added any enhanced components to it.

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[13] Ameritech Comments at 5, 8, n. 13; ACI Corp. Comments at 4.

[14] "What matters is that telecommunications is, in fact, transmitted elsewhere." Ameritech Opposition at 6.

However, this does mean that the telecommunications somehow retains its separate identity under the Act when used by the information service provider. Rather, as stated, when the information service provider receives the telecommunications offering and adds enhanced components to it, the entire service becomes an information service.

The *DSL Jurisdictional Order* noted that in a footnote in one of the Commission's ONA orders the Commission stated that "an otherwise interstate basic service ... does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."[15] In its initial comments, KMC pointed out that this decision merely determined that an incumbent LEC's telecommunications service offering does not lose its regulated status merely because it was provided to an information service provider that added enhanced components to it. KMC submits that to the extent the Commission intends to exalt this footnote to the level of a policy that telecommunications continues past an information service it is unlawful. KMC submits that this statement in a footnote in one of the Commission's now largely obsolete ONA orders cannot reverse 20 years of otherwise consistent treatment of information and telecommunications services as mutually exclusive regulatory categories under the Act.

KMC also reiterates that it is not necessary for the Commission to find that telecommunications continues past the ISP in order for it to assert jurisdiction in this case, assuming it does not completely rescind its jurisdictional determination. As pointed out by KMC, and as recognized by other commenters, the Commission under the Act has jurisdiction

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[15] *DSL Jurisdictional Order*, para. 20 citing *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 141, n. 617 (1988).

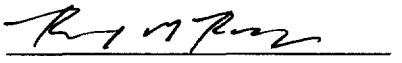
over interstate communications by wire ,[16] which is an overarching category that encompasses both information services and telecommunications.[17] If the Commission affirms its jurisdiction in this case, it should do so on the ground that there is a continuous interstate communication by wire comprised of two separate components - a telecommunications component and an information service component - that are mutually exclusive regulatory categories under the Act.

Accordingly, KMC urges the Commission on reconsideration to make clear that under the Act telecommunications ends where information service begins.

## III. CONCLUSION

For these reasons, KMC requests that the Commission on reconsideration rescind or revise the *DSL Jurisdictional Order* consistent with the views presented herein.

Respectfully submitted,



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Dated: January 19, 1999

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16 *See e.g.*, BellSouth Opposition at 3; GTE Opposition at 4.

17 See 47 U.S.C. Secs.153(22) and (53).

## CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 1999, copies of the foregoing Reply Comments of Logix Communications Corporation were served by hand delivery on the parties on the attached service list:

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